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## REPLY BRIEF FOR PETITIONER

In the twenty years since the enactment of the Prison Litigation Reform Act, four of the five courts of appeals that have considered the issue, along with the vast majority of district courts, have held that 42 U.S.C. § 1997e(d)(2) gives district courts discretion to apportion less than 25 percent of the judgment to attorney's fees. The statute provides that "a portion of the judgment (not to exceed 25 percent) shall be applied to satisfy the amount of attorney's fees." The lower courts have interpreted the statute to mean just what it says—that the portion of the judgment may not be larger than 25 percent, but it may be smaller.

Respondents defend the Seventh Circuit's idiosyncratic non-discretionary view of the statute, but they have understandably abandoned the Seventh Circuit's reasoning. *Cf. Johnson v. Daley*, 339 F.3d 582, 584-85 (7th Cir. 2003) (en banc). Respondents' new arguments, however, are no better than the one they have abandoned.

First, respondents misapprehend the statutory text, by reading language into the statute that is simply not there. Resp. Br. 7-16. The statute does not say that the attorney's fees must be satisfied first from the judgment, until the amount of fees reaches 25 percent of the judgment. Nor does the statute say that defendants are liable only for fees in excess of 25 percent of the judgment. All the statute says is that the portion of the judgment applied to attorney's fees may not exceed 25 percent. There are other statutes in which Congress has required that one source of funds be exhausted before turning to a second source, but this statute is not one of them.

Second, respondents misunderstand the surrounding context. Resp. Br. 16-20. Discretion in the apportionment of attorney's fees is consistent with the rest of section 1997e(d) and with Congress's other fee-shifting statutes, which likewise vest considerable discretion in the district courts. Because the backdrop to the statute is the fee-shifting rule of 42 U.S.C. § 1988, not the common law American Rule, there is no occasion to apply any presumption against fee-shifting. If a presumption is to be applied, it is section 1988's presumption in favor of fee-shifting.

Third, respondents draw the wrong conclusion from the statute's legislative history. Resp. Br. 21-23. Some of the statute's precursor bills included a sentence that would have made defendants liable for attorney's fees only to the extent the fees exceed 25 percent of the judgment. But this section was omitted from the final legislation. If any inference is to be drawn from this legislative history, it is that respondents' preferred rule was *not* adopted by Congress.

Finally, respondents misconceive the purpose of the PLRA. Resp. Br. 23-30. Congress's goal was not to make all litigation more burdensome for prisoners, but rather "to filter out the bad claims and facilitate consideration of the good." *Jones v. Bock*, 549 U.S. 199, 204 (2007). The district courts have been advancing this goal by apportioning less than 25 percent of the judgment to fees in the most egregious cases of misconduct by prison guards. In such cases, prisoners are encouraged to retain counsel and to file suit because they can obtain counsel at lower cost and they receive larger net recoveries. Defendants

are deterred more in egregious cases because they have to pay more.

In short, the conventional view of the statute is the correct one. The statute's text, context, legislative history, and purpose all point to the same conclusion—that district courts have discretion to apportion less than 25 percent of the judgment to attorney's fees.

## ARGUMENT

### A. The text of the statute explicitly gives the district court discretion to apply any portion of the judgment up to 25 percent.

1. The text of the statute provides that "a portion of the judgment (not to exceed 25 percent) shall be applied to satisfy the amount of attorney's fees." 42 U.S.C. § 1997e(d)(2). "25 percent" is plainly an upper limit. The statute directs the district court to decide on a sum less than or equal to 25 percent of the judgment, and then to apply that sum toward satisfying the amount of attorney's fees. Respondents err (Resp. Br. 7-16) in suggesting otherwise.

The statute does not say that fees must come from the judgment first and that defendants are responsible for fees only if 25 percent of the judgment is inadequate. Nor does the statute say that district courts must apportion exactly 25 percent of the judgment where fees exceed that amount. Congress could easily have enacted such a provision, but it did not. When Congress wishes to specify that one source of funds must be exhausted

before turning to a second source, Congress says so explicitly. *See, e.g.*, 15 U.S.C. § 78u-6(g)(3)(B) (requiring the SEC to pay into a fund only if other sources are insufficient); 12 U.S.C. § 1821a(c)(1) (requiring the Secretary of the Treasury to pay into a fund only if other sources are insufficient).

Respondents are mistaken in suggesting (Resp. Br. 10) that Congress did the same here. Section 1997e(d)(2) consists of two sentences. The first sentence of the statute says that "a portion of the judgment (not to exceed 25 percent) shall be applied to satisfy the amount of attorney's fees." 42 U.S.C. § 1997e(d)(2). The second sentence caps the overall fee award at 150 percent of the judgment.[1] It provides: "If the award of attorney's fees is not greater than 150 percent of the judgment, the excess shall be paid by the defendant." *Id.* Respondents err in claiming (Resp. Br. 10) that the second sentence "identifies an auxiliary source, specifying that if 25 percent of the judgment is not enough to satisfy the award 'the excess shall be paid by the defendant,' so long as the overall fee award is not greater than 150 percent of the judgment." The second sentence specifies nothing of the kind. It merely requires the defendant to pay the "excess"—that is, the fees left over after the portion payable from the judgment has

[1] The lower courts have uniformly interpreted the second sentence to cap fees at 150 percent of the judgment. *See, e.g., Boivin v. Black*, 225 F.3d 36, 40 (1st Cir. 2000) ("While section 1997e(d)(2) is awkwardly phrased, its import and its essence are transparently clear: '[w]henever a monetary judgment is awarded' in an action covered by the PLRA and the prevailing party seeks attorneys' fees, the defendant shall pay such fees up to a maximum of 150% of the judgment amount, and no more.").

been deducted—up to a maximum of 150 percent of the judgment. The word "excess" in the second sentence refers to the excess over the "portion of the judgment" applied to fees. It does not refer to the excess over 25 percent of the judgment.

Respondents further misdescribe the statute when they allege (Resp. Br. 14) that "[t]he first sentence establishes when the defendant's liability for fees *begins*: when 25 percent is inadequate to satisfy the fee award." The first sentence does not say anything remotely resembling that. It merely says that the portion of the judgment applied to attorney's fees may not exceed 25 percent.

Respondents' misguided analogy to insurance deductibles (Resp. Br. 12) is based on their erroneous view of the statutory text. Insurance policies explicitly provide that coverage begins only when the entire amount of the deductible has been exhausted. But section 1997e(d)(2) includes no comparable provision. It does not say that defendants are liable for attorney's fees only when fees exceed 25 percent of the judgment. Rather, it says that the portion of the judgment applied to attorney's fees may not exceed 25 percent.

A hypothetical may help clarify this point. If a statute said "five dollars shall be applied to satisfy the amount of attorney's fees," and someone asked "how much shall be applied?", the answer would be obvious: five dollars. The same is true here, with the statutory phrase "a portion of the judgment (not to exceed 25 percent)" substituted for "five dollars." The statute says "a portion of the judgment (not to exceed 25 percent) shall be applied to satisfy the amount of attorney's fees." How much shall be

applied? The answer is obvious: a portion of the judgment (not to exceed 25 percent).

Respondents err once more in suggesting (Resp. Br. 14) that Congress's use of the word "shall" bars district courts from apportioning nominal amounts of the judgment to attorney's fees. Congress often uses the word "shall" to confer discretion on district courts to choose within a range between a maximum at the top and a nominal amount at the bottom. For example, criminal statutes routinely direct that a defendant "shall be fined not more than" a certain amount. *See, e.g.*, 18 U.S.C. § 1168(a) (employee of Indian gaming establishment "shall be fined not more than $250,000" for theft from the establishment); *id.* § 1958(a) (defendant "shall be fined not more than $250,000" for use of interstate commerce to commit murder for hire); *id.* § 2332h(c)(1) (person producing radiological dispersal device "shall be fined not more than $2,000,000"). All such statutes, like the one in our case, require the district court to transfer money, but permit the amount transferred to be nominal. It is not unusual for courts to impose nominal fines. *See, e.g.*, *Woodruff v. Thornsbury*, 2014 WL 5320611, *2 (S.D.W.V. 2014) (noting that certain first-time offenders are typically sentenced to pay nominal fines); *United States v. Matos*, 611 F.3d 31, 40 (1st Cir. 2010); *United States v. Heckman*, 592 F.3d 400, 403 (3d Cir. 2010).

In misreading the statute's text, respondents go astray at the very beginning of their argument, where they erroneously assert (Resp. Br. 1) that the goal of the statute was "to put prisoners in roughly the same position as members of the general public," whose lawyers receive a contingent fee rather than

statutory fees under 42 U.S.C. § 1988. The statute manifestly does not establish a contingent fee regime for prisoner suits. That could easily have been accomplished, simply by making prisoners ineligible for fees under section 1988. The statute merely says that a portion of the judgment, not to exceed 25 percent, shall be applied to the fees. But even if establishing a contingent fee regime were the goal of the statute, that goal could not supersede the statute's text. Congress enacts words, not goals. The Court "will not presume ... that any result consistent with ... the statute's overarching goal must be the law but will presume more modestly instead that the legislature says what it means and means what it says." *Henson v. Santander Consumer USA Inc.*, 137 S. Ct. 1718, 1725 (2017) (citation, ellipses, and internal quotation marks omitted).

2. Lacking any textual justification for their theory, respondents argue (Resp. Br. 8) that the "satisfaction" of a fee award "means complete payment of that award." But the statute itself states that the prisoner need not make complete payment of the fee award. The prisoner need only pay "a portion of the judgment (not to exceed 25 percent)." 42 U.S.C. § 1997e(d)(2). In the typical prisoner case, even the maximum 25 percent would be nowhere close to complete payment of the fee award, because the median judgment in prisoner cases is only a bit more than $4,000. Margo Schlanger, *Trends in Prisoner Litigation, as the PLRA Enters Adulthood*, 5 U.C. Irvine L. Rev. 153, 168 (2015). Respondents may be correct that the word "satisfaction," standing alone, often means "complete payment," but that has no relevance to the statute, because the statute's

text makes clear that complete payment of the fee award will normally not come from the judgment.

The phrase "applied to satisfy," as it appears in the statute, must therefore mean "applied toward satisfying," not "applied in complete payment of." This is a conventional use of the phrase, both in ordinary speech and in federal statutes. In ordinary speech, the credits from a math class, for example, may be "applied to satisfy" the requirements of a chemistry major. An example from a statute: Navy personnel get extra pay when they serve on submarines for 48 hours in a month. Hours in excess of 48 in a given month may be "applied to satisfy" the 48-hour requirement in subsequent months. 37 U.S.C. § 301c(a)(5)(A)(i)(I).

Section 1997e(d)(2) thus directs the district court to apply part of the judgment toward satisfying the attorney's fees. The statute expressly designates the amount that must be applied toward satisfying the attorney's fees—"a portion of the judgment (not to exceed 25 percent)." The district court complies with this directive so long as the portion of the judgment applied to attorney's fees does not exceed 25 percent. Contrary to respondents' contention (Resp. Br. 11), this common-sense understanding of "applied to satisfy" does not render any part of the statutory text superfluous.

Respondents' strained interpretation of the word "satisfy" has never been accepted by any court, because it cannot overcome the plain meaning of the statute. The statute does not say that the fees must be satisfied from the judgment, subject to a 25 percent cap. The statute just says that the portion of

the judgment applied to satisfy the fees cannot exceed 25 percent.

### B. Respondents misunderstand the statute's context, which confirms that district courts have this discretion.

1. Respondents suggest (Resp. Br. 16-17) that the statute must be read to deny discretion to district courts because other parts of section 1997e(d) deny discretion to district courts. This suggestion misunderstands the provisions of section 1997e(d) to which respondents refer, all of which confer considerable discretion. Section 1997e(d) limits the *amount* of attorney's fees in prisoner cases, *Woodford v. Ngo*, 548 U.S. 81, 84 (2006), but it preserves most of the district court's traditional discretion to determine that amount.

For example, attorney's fees must be "directly and reasonably incurred." 42 U.S.C. § 1997e(d)(1)(A). The amount of the fee must be "proportionately related" to the relief ordered. *Id.* § 1997e(d)(1)(B)(i). Fees incurred while enforcing an order must be "directly and reasonably incurred." *Id.* § 1997e(d)(1)(B)(ii). "Reasonably" and "proportionately" are classic discretion-conferring terms. *See, e.g., Perdue v. Kenny A.*, 559 U.S. 542, 558 (2010) ("Determining a 'reasonable attorney's fee' is a matter that is committed to the sound discretion of a trial judge."). Even the caps on the amount of the fee, 42 U.S.C. § 1997e(d)(2), and the hourly rate, *id.* § 1997e(d)(3), preserve the district court's discretion under section 1988 to determine a fee that is "reasonable." Given this context, it makes perfect sense that Congress would likewise authorize district courts to exercise

discretion in apportioning the fee between the plaintiff and the defendant.

In authorizing district courts to exercise discretion over attorney's fees, section 1997e(d) is typical of Congress's fee-shifting statutes, because setting attorney's fees is an inherently discretionary task. "[T]he district court has discretion in determining the amount of a fee award," the Court has explained, "in view of the district court's superior understanding of the litigation and the desirability of avoiding frequent appellate review of what essentially are factual matters." *Hensley v. Eckherhart*, 461 U.S. 424, 437 (1983). Discretion is the norm when it comes to fee-shifting statutes. *Hardt v. Reliance Standard Life Ins. Co.*, 560 U.S. 242, 254 (2010) ("Statutes vesting judges with such broad discretion are well known in the law, particularly in the attorney's fees context."). The statute at issue in our case is a good example.

Respondents repeatedly complain (Resp. Br. 6, 11, 14) that the statute does not channel the district court's discretion. But that is Congress's normal practice in fee-shifting statutes, which typically vest considerable discretion in district courts, cabined only by very broad requirements of reasonableness or numerical caps. It is hard to imagine how Congress's practice could be otherwise, in light of the wide variety of circumstances that arise in litigation. The cases in which fees are awarded are often "complex, involving multiple claims for relief that implicate a mix of legal theories and have different merits. ... In short, litigation is messy, and courts must deal with this untidiness in awarding fees." *Fox v. Vice*, 563 U.S. 826, 833-34 (2011).

2. Respondents misapprehend the statute's context in a second way as well. They argue (Resp. Br. 18-20) that there is a presumption against fee-shifting which the statute fails to overcome. Respondents are triply mistaken.

First, the only "presumption against fee-shifting" is the ordinary presumption that the common law applies unless a statute has modified the common law. *Baker Botts L.L.P. v. Asarco LLC*, 135 S. Ct. 2158, 2164 (2015). There is no clear-statement rule for fee-shifting statutes. At common law, under the American Rule, each party bore its own fees, but Congress has enacted several statutes modifying the American Rule in particular kinds of cases. These fee-shifting statutes are interpreted straightforwardly, without any thumb on the scale. *See, e.g.*, *Octane Fitness, LLC v. Icon Health & Fitness, Inc.*, 134 S. Ct. 1749, 1755-58 (2014).

Second, our case falls within one of the categories of cases for which Congress clearly *has* modified the American Rule. When plaintiffs prevail under 42 U.S.C. § 1983, they are entitled to attorney's fees under 42 U.S.C. § 1988. Section 1988 dispels any presumption against fee-shifting.

Third, the statute at issue in our case is an exception to section 1988, not an exception to the American Rule. The general rule established by section 1988 is that prevailing plaintiffs in section 1983 cases are entitled to a reasonable attorney's fee. The statute in our case limits that general rule in certain respects when the plaintiff is a prisoner. Where Congress legislates against the background of the American Rule, the American Rule applies unless Congress says otherwise. *Fogerty v. Fantasy, Inc.*,

510 U.S. 517, 533-34 (1994). By the same token, where Congress legislates against the background of section 1988, section 1988 applies unless Congress says otherwise. If any presumption is to be applied, therefore, it would be a presumption *in favor of* fee-shifting, not a presumption against it.

### C. The legislative history shows that Congress rejected respondents' view of the statute.

Respondents note (Resp. Br. 21) that some of the statute's precursor bills included a sentence that provided: "If the award of attorney's fees is greater than 25 percent of the judgment, the excess shall be paid by the defendant." *See* H.R. 2076, 104th Cong., § 803(d) (1995); S. 1275, 104th Cong., § 3 (1995); S. 1279, 104th Cong., § 3 (1995) (all reproduced in *A Legislative History of the Prison Litigation Reform Act of 1996* (Bernard D. Reams, Jr. & William H. Manz eds., 1997), docs. 42, 44, and 45). Congress omitted this sentence from the final legislation. The legislative history includes no discussion of why.

Normally, of course, when a provision is omitted from legislation, the inference is that the provision is *not* part of the legislation. *See, e.g., Russello v. United States*, 464 U.S. 16, 23-24 (1983). Here, that normal inference would confirm that respondents' view of the statute is incorrect. Respondents argue that the defendant is responsible for attorney's fees only to the extent the fees exceed 25 percent of the judgment. While these bills were working their way through Congress, however, Congress rejected such a rule.

Respondents draw an inference that is the mirror image of the normal one. They argue (Resp. Br. 22-23) that Congress deleted the sentence in order to enshrine it into law. This paradoxical claim is, unsurprisingly, not supported by any evidence. Respondents cite general statements by two Senators discussing their support for the PLRA, but these statements are completely unrelated to the apportionment of attorney's fees.

Respondents speculate (Resp. Br. 22-23) that perhaps Congress deleted the second sentence on the ground that it was redundant, because the rule expressed in the second sentence had already been stated in the first. But this is an unlikely explanation, because the first sentence merely provided that the portion of the judgment applied to attorney's fees could not exceed 25 percent. A much likelier explanation is that by choosing to keep the first sentence but to jettison the second, Congress chose to keep a 25 percent ceiling for the plaintiff's contribution to fees, but to reject a 25 percent floor for the defendant's contribution.

If any inference is to be drawn from the legislative history, therefore, it is the conventional one. By omitting language that would have made defendants liable for attorney's fees only to the extent the fees exceed 25 percent of the judgment, Congress intended *not* to enact such a rule. Rather, Congress intended to enact the rule it actually enacted, under which the district court has discretion to apportion less than 25 percent of the judgment to attorney's fees.

### D. Respondents misconceive the purpose of the PLRA, which is best served by discretion regarding the apportionment of fees.

Respondents are under the misimpression (Resp. Br. 23-30) that the purpose of the PLRA was to make *all* litigation more burdensome for prisoners. Such a goal would no doubt have been advanced by forcing prisoners to pay the maximum amount of attorney's fees in every case. But respondents misconceive the PLRA's purpose.

The purpose of the PLRA was "to reduce the quantity and improve the quality of prisoner suits." *Porter v. Nussle*, 534 U.S. 516, 524 (2002). The goal was to empower district courts to shed the frivolous cases so they could spend more time ensuring that prisoners obtained appropriate relief in meritorious cases. "To that end, Congress enacted a variety of reforms designed to filter out the bad claims and facilitate consideration of the good." *Jones v. Bock*, 549 U.S. 199, 204 (2007). Section 1997e(d)(2) was one of these reforms. It comes into play only in meritorious cases, after the prisoner has already prevailed at trial. It is a statute that helps district courts facilitate consideration of the good claims.

Ever since section 1997e(d)(2) was enacted, the vast majority of district courts—even in the Seventh Circuit, until this case—have been exercising their discretion under the statute to ensure that prisoners pay a smaller share of the attorney's fees in the most egregious cases. Pet. Br. 22-23 (citing cases). Respondents doubt (Resp. Br. 25-26) that adjusting the apportionment of attorney's fees could affect any-

one's incentives, but the district judges who preside over these cases surely know better.

First, under the conventional view of the statute, prisoners obtain counsel at lower cost and receive larger net recoveries in the most egregious cases. This result encourages prisoners to retain counsel and to file suit in precisely the cases the PLRA was intended to facilitate. *See, e.g.*, *Hernandez v. Goord*, 2014 WL 4058662, *13 (S.D.N.Y. 2014) (apportioning 5 percent of the judgment toward attorney's fees so as not to "deter prisoners from bringing meritorious claims in the future").

Second, under the conventional view of the statute, because lawyers are less expensive for prisoners to retain in egregious cases, more lawyers represent prisoners in such cases. Prisoners with meritorious claims need lawyers, because it extraordinarily difficult for an incarcerated prisoner to litigate on his own. But the vast majority of prisoners have to proceed *pro se*. Representing prisoners is not a path to riches. It is often very hard for prisoners to find counsel, even in meritorious cases. Margo Schlanger, *Inmate Litigation*, 116 Harv. L. Rev. 1555, 1609-13 (2003). By exercising their discretion so as to increase the number of lawyers involved in these cases, the district courts have been facilitating the consideration of meritorious claims.

Third, under the conventional view of the statute, defendants pay a greater share of the attorney's fees in the most egregious cases. This result provides an extra measure of deterrence where deterrence is most needed. *See, e.g.*, *Dykes v. Mitchell*, 2009 WL 3242006, *2 (E.D. Mo. 2009) (apportioning 5 percent of the judgment toward attorney's fees because "the

degree of defendant Mitchell's culpability was high" and because "an award of attorney's fees against Mitchell could deter other persons acting under similar situations"). "It should hardly need stating that, ordinarily, liability in damages for unconstitutional or otherwise illegal conduct has the very desirable effect of deterring such conduct. Indeed, this was precisely the proposition upon which § 1983 was enacted." *Imbler v. Pachtman*, 424 U.S. 409, 442 (1976). Respondents protest (Resp. Br. 28) that punitive damages are available in cases of egregious misconduct. Indeed they are, but punitive damages have never been understood to be an exclusive deterrent preempting the use of all others.

Contrary to the view of amici Michigan et al. (Mich. Br. 15-20), district courts do not engage in impermissible "double-counting" when they consider the egregiousness of the constitutional violation in apportioning fees. In virtually all areas of law, the factors that determine whether a violation has occurred and that determine the severity of the violation are the same factors that determine the relief received by the plaintiff. On Michigan's theory, a court would be barred from considering the severity of *any* tort in setting the appropriate level of damages or fees, because the court had already considered the culpability of the defendant's conduct at the liability stage.

Ours is an egregious case. Respondents beat Charles Murphy so badly they knocked him unconscious and crushed his eye socket, causing permanent damage to his vision. They left him naked and bleeding on the floor of a cell, without any medical attention, although they knew full well that he

needed it. Pet. Br. 4. As amici ACLU et al. demonstrate, prison guards sometimes abuse their power in shocking ways. Discretion regarding the apportionment of attorney's fees best serves the purpose of the PLRA, by encouraging prisoners to retain counsel and file the lawsuits that are the only realistic means of deterring this kind of misconduct.

## CONCLUSION

The judgment of the U.S. Court of Appeals for the Seventh Circuit should be reversed.

Respectfully submitted,

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